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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JANETH LOPEZ et al., Defendants and Appellants.	B271516 (Los Angeles County Super. Ct. No. BA404685)

APPEALS from judgments of the Superior Court of Los Angeles County, Curtis B. Rappé, Judge. Affirmed as modified and remanded with directions as to appellant Janeth Lopez.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Janeth Lopez.

Janyce Keiko Imata Blair, under appointment by the Court of Appeal, for Defendant and Appellant Ivy Navarrete.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

An act of vandalism—spraying graffiti on a church wall—ended with one person dead and a second wounded. The shooter, Pedro Martinez, was convicted of first degree murder and attempted premeditated murder. Following a mistrial and a second trial, Janeth Lopez, who had marked the church wall with spray paint, and Ivy Navarrete, who drove Martinez and Lopez away from the church after the shooting, were convicted of second degree murder and attempted premeditated murder with special findings the offenses had been committed to benefit a criminal street gang and a principal had personally discharged a firearm causing death or great bodily injury to the victims.

On appeal Lopez and Navarrete principally challenge the propriety of their convictions for murder and attempted murder under the natural and probable consequences theory and the sufficiency of the evidence to support the finding the crimes were committed to benefit a criminal street gang.[1] They also raise several sentencing issues. We affirm the judgments as modified to correct sentencing errors and remand as to Lopez for further proceedings pursuant to *People v. Franklin* (2016) 63 Cal.4th 261 (*Franklin*).

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[1] Martinez's convictions were affirmed by this court last year in a nonpublished decision. (*People v. Martinez* (Dec. 12, 2016, B262799).)

FACTUAL BACKGROUND

1. *The Shootings*

In the early evening of November 4, 2012 Hipolito Acosta, Santos Baquiax and Andres Ordonez were in the back parking lot of a church at the corner of Beverly Boulevard and Reno Street in Los Angeles, preparing food for members of the congregation. When they heard the sound of shattering glass from the street, Acosta went to investigate. He saw Lopez spray painting graffiti on the wall of the church and asked what she was doing. Lopez replied, "fuck off," and ran at Acosta, hitting him on the arm with the spray paint can. Lopez knocked Acosta to the ground and kicked him, all the while yelling at him.

As Lopez was attacking Acosta, Baquiax and Ordonez came out from the parking lot. When Baquiax was about six feet from Acosta and Ordonez about 12 feet away, Lopez ran to a BMW parked in front of the church. Acosta saw her throw the spray paint can on the ground.

As Lopez ran back to the BMW, Martinez got out of the back seat of the car and fired three or four shots in the direction of Baquiax and Ordonez. One bullet hit Baquiax in the shoulder, and he fell to the ground. Another bullet struck Ordonez in the chest; he managed to walk back to the parking lot, where he collapsed. Ordonez died from the bullet wound to his chest.

Martinez returned to the BMW. Baquiax saw someone in the driver's seat but could not tell if it was a man or a woman. The BMW drove away.

2. *The Investigation*

Officers from the Los Angeles Police Department arrived at the scene shortly after the shootings. They recovered three shells, which had been fired from a semiautomatic weapon, from

the sidewalk and found a spray paint can by the curb. Lopez's fingerprint and DNA were on the can. The police also found a broken beer bottle in the gutter near the spray paint can. Navarrete's fingerprint and DNA were on the bottle. Graffiti found on a nearby building contained three names: "Looney," "Wicked" and "Ivy." It also had the words, "Fuck Tampax."

On November 7, 2012 Baquiax identified Lopez from a photographic lineup as the woman he saw hitting Acosta. Baquiax also identified Martinez from a photographic lineup as the shooter. On November 8, 2012 Acosta also identified Lopez from a photographic lineup. He was not certain of his identification but thought she "could be the one."

Officers arrested Lopez at her home a few miles from the crime scene on November 8, 2012. The following day Navarrete's home was searched. The officers found a letter Lopez sent to Navarrete in 2008 that referred to "Rockwood" and was signed "from Looney." Officers also found a photograph of Lopez and Navarrete together; Lopez was making a Rockwood Street gang hand symbol.

At the time of the church shooting Navarrete had been living with Sonia Vallejo. Navarrete and Vallejo's stepson had a child together. According to Vallejo, Navarrete and Lopez were close friends and spent weekends together. Navarrete, who drove a grey BMW, provided transportation for Lopez, who did not have a car. Navarrete also talked to someone named Pedro or Peter.

On the day of the shooting, Friday, November 4, 2012, Navarrete told Vallejo she was going to be with Lopez. Navarrete returned home Sunday night. Several days later Navarrete was gone, leaving her child and all her belongings at Vallejo's home.

Navarrete and Martinez were found and detained in Mexico in February 2013.

The police examined cell phones belonging to Lopez, Navarrete and Martinez. Lopez's contacts included Navarrete and Martinez. Navarrete and Martinez had exchanged text messages; Martinez had made calls to Lopez. On the evening of November 6, 2012 all three cell phones had been in the same general area near Lopez's home and near the scene of the shooting.

3. *Gang Evidence*

Los Angeles Police Officer Antonio Hernandez testified Rockwood Street was a criminal street gang that had started in the early 1980's. In November 2012 it had about 180 members, including 20 active members. (Officer Hernandez defined active members as members who were not incarcerated.) The gang had its own territory, symbols and hand signs. The gang's primary activities included murder, robbery, assault and extortion. Rockwood Street members were convicted of murder in 2007 and 2008.

Officer Hernandez explained Rockwood Street had subsets or cliques based on location. Two of the cliques were Westmoreland and K.T.O. Members of these two cliques got along with one another and engaged in joint activities.

According to Officer Hernandez, the Temple Street gang had been Rockwood Street's enemy since 2003; and members of the two gangs tried to eliminate or kill each other. Rockwood Street members used "Tampax" as a derogatory term for Temple Street members. The areas where the shootings took place and the additional graffiti was discovered were in Temple Street territory.

Officer Hernandez knew Lopez to be a Rockwood Street member in the K.T.O. clique with the moniker "Looney." She had admitted being a member, had Rockwood Street tattoos, had appeared in photographs with other Rockwood Street members making gang signs and had sent text messages discussing "Temple" and being in its territory.

The text messages on Lopez's cell phone referred to her being "in the hood" and "posted with the homies," which signified she was out in public with other gang members. "I went writing to the Tampax hood," a message also found on her phone, meant she had been tagging in Temple Street territory.

Officer Hernandez believed Martinez was a Rockwood Street member in the Westmoreland clique, with the gang monikers "Rabbit" and "Wicked." Martinez had Rockwood Street tattoos on his head, arms, legs and body.

Officer Hernandez opined that Navarrete was a Rockwood Street associate based on his previous contact with her, the fact her boyfriend, Martinez, was a gang member and the 2008 letter Lopez had written to Navarrete discussing Rockwood Street. According to Officer Hernandez, Lopez would not write such things to an individual who was not associated with the gang. The officer explained the term "associate" was used for someone who was seen with the gang in public and might be involved in criminal activity with the gang but either was not a formal member of the gang or there was not sufficient information for law enforcement to conclude the person was a gang member.

Officer Hernandez explained that tagging crews use graffiti as art, while gang members use graffiti to mark their territory. Territory is very important to gang members, and infiltrating another gang's territory is an aggressive sign of disrespect.

Putting up graffiti in a rival gang's territory would boost a gang member's respect within his or her own gang. However, a gang member engaging in this activity could expect members of the rival gang to react with violence, including assault with a deadly weapon or murder, if caught in the act. For this reason, a gang member putting up graffiti in rival territory would often go with a group that might include a getaway driver and a shooter in case there was a violent confrontation.

Given a hypothetical based on the facts of the case, Officer Hernandez opined the shootings were for the benefit of, and in association with, a criminal street gang: It showed the gang was able to put up graffiti in its rival's territory, and no one was capable of preventing it from doing so.

The fresh graffiti found on the building near the shooting scene included the word "REST" with the "T" crossed out, as a sign of disrespect to Temple Street, and "Fuck Tampax," another sign of disrespect. The names "Looney," "Wicked" and "Ivy" were a roll call of the participants. Officer Hernandez stated this graffiti was similar to the graffiti Lopez had placed on the church wall.

4. *Defense*

Neither Lopez nor Navarrete testified in her own defense. Ana Mendez, Ordonez's wife, told the police that she saw a man drive up in a black car, get out and begin shooting.

In an interview shortly after the shooting, Veronica Canales told the police that two men waited in the car while the female tagger attacked Acosta. However, in a November 8, 2012 interview Canales said a man got out of the rear of the car and started shooting. She did not really see the car or who was in it because she was focused on the attack on Acosta.

PROCEDURAL BACKGROUND

1. *The First Trial*

On July 15, 2013 Lopez, Navarrete and Martinez were charged by information with the murder of Ordonez (Pen. Code, § 187, subd. (a); count 1),[2] attempted willful, deliberate and premeditated murder of Baquiax (§§ 187, subd. (a), 664; count 2) and Acosta (count 3), and misdemeanor vandalism—graffiti—with damage under $400 (§ 594, subd. (a); count 4). The information alleged that in the commission of the murder and attempted murders a principal had personally used and intentionally discharged a firearm (§ 12022.53, subds. (b), (c), (e)(1)) and, as to counts 1 and 2, the principal's personal use and discharge of the firearm caused great bodily injury and death (§ 12022.53, subds. (d), (e)(1)). The information further alleged the crimes had been committed for the benefit of a criminal street gang (§ 186.22, subds. (b)(1)(C), (d)). The information also alleged that Navarrete and Martinez each had a prior conviction of a serious or violent felony within the meaning of the three strikes law (§§ 667, subds. (b)-(i), 1170.12).

At the initial trial in the case, the jury convicted Martinez of murder, one count of attempted murder (Baquiax) and vandalism and found true the firearm-use and criminal street gang enhancement allegations. It was unable to reach a verdict as to the second count of attempted murder (Acosta).

The jury convicted Lopez and Navarrete of vandalism and found true the criminal street gang allegations. It was unable to

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[2] Statutory references are to this code unless otherwise stated.

reach a verdict as to the remaining charges, and the trial court declared a mistrial as to those counts.

2. *The Second Trial and Sentencing*

When the case was called for retrial on November 9, 2015, on the People's motion the trial court dismissed the count alleging Acosta's attempted murder. The jury then convicted Lopez and Navarrete of second degree murder and attempted willful, deliberate and premeditated murder. It found true the allegations a principal had personally and intentionally discharged a firearm in the commission of the crimes, causing great bodily injury and death, and the crimes were committed for the benefit of a criminal street gang.

The trial court sentenced Lopez to an aggregate indeterminate state prison term of 40 years to life: 15 years to life for second degree murder, plus 25 years to life for the firearm-use enhancement on that count; and a concurrent term of life for attempted premeditated murder with a minimum parole eligibility date of 15 years based on the criminal street gang enhancement, plus 25 years to life for the firearm-use enhancement on that count. The court also imposed and stayed 10-year criminal street gang enhancements on those two counts and imposed and stayed a two-year term for vandalism, which became punishable as a felony because of the gang enhancement.

The court sentenced Navarrete to an aggregate indeterminate state prison term of 60 years to life: 15 years to life for second degree murder, doubled for the prior strike, plus 25 years to life for the firearm-use enhancement on that count, plus five years for a prior serious felony conviction; and a concurrent term of life imprisonment for attempted premeditated murder, with a minimum parole eligibility date of 30 years, plus

25 years to life for the firearm-use enhancement on that count, plus five years for the prior serious felony conviction. As with Lopez, the court also imposed and stayed 10-year criminal street gang enhancements on those two counts and imposed and stayed a two-year felony term for vandalism.

DISCUSSION

1. *The Trial Court Properly Instructed the Jury That Lopez and Navarrete Could Be Convicted of Second Degree Murder and Attempted Premeditated Murder Under the Natural and Probable Consequences Doctrine*

The People's theory of the case was that Lopez, Navarrete and Martinez conspired to commit vandalism and Ordonez's murder and the attempted murder of Baquiax were the natural and probable consequences of that conspiracy, making Lopez and Navarrete liable for Martinez's commission of the more serious crimes.

The trial court instructed the jury pursuant to CALCRIM No. 416 on the elements of conspiracy to commit vandalism and for determining whether Lopez and Navarrete were members of the conspiracy. The trial court then instructed pursuant to CALCRIM No. 417 on liability for coconspirators' acts under the natural and probable consequences doctrine: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime. [¶] A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan. Under this rule, a

defendant who is a member of the conspiracy does not need to be present at the time of the act.

"A natural and probable consequence is one that a reasonable person in the defendant's position would have or should have known was likely to happen if nothing unusual intervened. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

"A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.

[¶] . . . [¶]

"A defendant is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy. [¶] A conspiracy member is not responsible for the acts of other conspiracy members that are done after the goal of the conspiracy had been accomplished."

Navarrete and Lopez contend the trial court erred in giving this instruction "because our courts have determined that a coconspirator is not criminally liable for the crimes committed by another coconspirator when the connection between the conspirator's conduct and the perpetrator's conduct and mental state are too attenuated; when there are severe penalty differences between the intended target crime (in this case, the general intent crime of misdemeanor vandalism) and the unintended crimes (in this case, the specific intent crimes of murder and attempted murder); and because of the rationale

underlying the natural and probable consequences doctrine."[3] None of their claims has merit.

a. *Attenuation between the coconspirators' and perpetrator's mental states*

In *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*) the Supreme Court held an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. (*Id.* at pp. 158-159.) The Court explained, "Aider and abettor culpability under the natural and probable consequences doctrine is vicarious in nature." (*Id.* at p. 164.) "'Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime.'" (*Ibid.*) Although aider and abettor liability is not directly measured by that actor's conduct or mental state, "the legitimate public policy concern of deterring aiders and abettors from aiding or encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing," the Court reasoned, would be "served by holding them culpable for the perpetrator's commission of the nontarget offense of second degree murder." (*Id.* at p. 165.)

The public policy concern for deterrence, however, "loses its force in the context of a defendant's liability as an aider and abettor of a first degree premeditated murder. First degree murder, like second degree murder, is the unlawful killing of a

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[3] Lopez and Navarrete have joined in all contentions raised by one that might also accrue to the other's benefit. (See Cal. Rules of Court, rule 8.200(a)(5).)

human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty. [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. . . . [T]he connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated public policy concern of deterrence." (*Chiu, supra*, 59 Cal.4th. at p. 166.) For these reasons, the Court held "that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine." (*Ibid.*)

Less than a year after *Chiu*, the Third District in *People v. Rivera* (2015) 234 Cal.App.4th 1350 held the *Chiu* analysis applies to a conviction for murder based on the natural and probable consequence of a conspiracy. The court recognized "'the conspirator need only intend to agree or conspire and to commit the offense which is the object of the conspiracy [citation]; while the aider and abettor must intend to commit the offense or to encourage or facilitate its commission.'" (*Id.* at p. 1356, fn. 5.) However, "[u]nder both these theories, the extension of liability to additional reasonably foreseeable offenses rests on the 'policy [that] conspirators and aiders and abettors should be responsible for the criminal harms they have naturally, probably and

foreseeably put in motion.' [Citation.] The problem with extending a defendant's liability for a first degree premeditated murder to an aider and abettor (and we hold also a coconspirator) under the natural and probable consequences doctrine was explained in *Chiu* . . . ." (*Id*. at pp. 1356-1357; accord, *In re Lopez* (2016) 246 Cal.App.4th 350, 357.)

As mandated by *Chiu*, the trial court in this case properly instructed the jury, if it found Ordonez's murder was a natural and probable consequence of the charged conspiracy to commit vandalism, Lopez and Navarrete would be liable for second degree murder only. By parity of reasoning, Lopez and Navarrete contend, it was error to instruct the jury they could be found guilty of attempted premeditated murder under the natural and probable consequences doctrine because an aider and abettor's or coconspirator's culpability and that of the perpetrator are as attenuated in an attempted premeditated murder case as in the case of first degree premeditated murder considered in *Chiu*.

We acknowledge the logic of this argument. Attempted premeditated murder, like attempted murder, requires a direct but ineffective step toward killing another person with the specific intent to kill that person (CALCRIM No. 600), but has the additional elements of willfulness, premeditation and deliberation that, as with murder itself, trigger a heightened penalty. Nonetheless, in *People v. Favor* (2012) 54 Cal.4th 868, the Supreme Court held, "[u]nder the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable

consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation.' (*Id*. at p. 880.) Two years later in *Chiu* the Supreme Court did not question the continued viability of *Favor*, and instead simply distinguished it. (*Chiu*, *supra*, 59 Cal.4th at p. 163.) We are bound by the holding in *Favor*. (*People v. Johnson* (2012) 53 Cal.4th 519, 527-528.)[4]

b. *The discrepancy between the penalties for the target and nontarget offenses*

Lopez and Navarrete also contend it was error to utilize the natural and probable consequences doctrine in this case because of the severe penalty differences between misdemeanor vandalism, the object of the alleged conspiracy, on the one hand, and second degree murder and attempted premeditated murder, on the other hand. Although the Supreme Court in *Chiu*, when discussing the attenuation between the aider and abettor's culpability and the perpetrator's premeditative state, referred to "the severe penalty" for first degree premeditated murder (*Chiu*, *supra*, 59 Cal.4th at p. 166), the Court did not suggest that disparity in penalties was a basis for not applying the natural and probable consequences doctrine.

To be sure, the Court of Appeal in *People v. Montes* (1999) 74 Cal.App.4th 1050, evaluating the defendant's challenge to an instruction he could be convicted of attempted murder on a natural and probable consequence theory for aiding and abetting simple assault or breach of the peace for fighting in public,

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[4] The continuing viability of *Favor* is currently before the Supreme Court. (*People v. Mateo* (Feb. 10, 2016, B258333), review granted May 11, 2016, S232674.)

conceded "it is rarely, if ever, true that 'an aider and abettor can "become liable for the commission of a very serious crime" committed by the aider and abettor's confederate [where] "the target offense contemplated by his aiding and abetting [was] trivial."' [Citation.] 'Murder, for instance, is *not* the natural and probable consequence of trivial activities. To trigger application of the "natural and probable consequences" doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed.'" (*Id.* at p. 1055.) On the record before it, however, the *Montes* court concluded the target offenses of simple assault and breach of the peace for fighting in public were not trivial. "They arose in the context of an ongoing rivalry between [criminal street gangs] during which the two gangs acted violently toward each other." (*Ibid.*) The gang expert explained that "these facts represent a textbook example of how a gang confrontation can easily escalate from mere shouting and shoving to gunfire. [The court concluded t]here can be little question that the target offenses of assault and breach of the peace were closely connected to the shooting." (*Ibid.*)

This case is similar. While misdemeanor vandalism, in and of itself, may be relatively trivial, the jury could reasonably conclude under the circumstances of this case it was not. Lopez, Navarrete and Martinez went into rival gang territory to spray graffiti, including markings that disparaged and disrespected the rival gang. Officer Hernandez testified not only that infiltrating another gang's territory is an aggressive sign of disrespect but also that gang members engaged in that activity could expect rival gang members to react with violence. For this reason, Officer Hernandez explained, a gang member putting up graffiti in rival territory would go with a group, which might include a

getaway driver and a shooter in case there was a violent confrontation. Based on that testimony, misdemeanor vandalism could properly be seen as a target crime that would naturally, probably and foreseeably result in a murder. (See *Chiu*, *supra*, 59 Cal.4th at p. 166.)

2. *Substantial Evidence Supports the Findings That Ordonez's Murder and the Attempted Murder of Baquiax Were the Natural and Probable Consequences of the Conspiracy To Commit Vandalism*

In evaluating Lopez and Navarrete's contention the evidence is insufficient to support their convictions for murder and attempted murder under the natural and probable consequences doctrine, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient

evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.) "'Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*People v. Clark* (2016) 63 Cal.4th 522, 626.)

In support of their contention there was insufficient evidence to support the findings murder and attempted premeditated murder were a natural and probable consequence of conspiracy to commit misdemeanor vandalism, Lopez and Navarrete principally rely on *People v. Leon* (2008) 161 Cal.App.4th 149. In that case Leon and a second gang member had been breaking into vehicles in the parking lot of an apartment complex when the brother of a car owner saw them and said he was going to call the police. The second gang member looked at him and fired a gun into the air. (*Id.* at pp. 153-154.) Leon was convicted of burglary, possession of a concealed weapon and, on an aiding and abetting theory, witness intimidation. (*Id.* at pp. 155-156.) On appeal he argued there was insufficient evidence to support his conviction of witness intimidation under the natural and probable consequences doctrine. (*Id.* at pp. 159-160.)

The Court of Appeal reversed the conviction for witness intimidation. Explaining its decision, the court observed, "Cases involving the natural and probable consequences doctrine frequently 'involve[] situations in which a defendant assisted or encouraged a confederate to commit an assault with a deadly

weapon or with potentially deadly force, and the confederate not only assaulted but also murdered the victim.'" (*People v. Leon*, *supra*, 161 Cal.App.4th at p. 160.) Courts have also "'applied the "natural and probable consequences" doctrine in situations where a defendant assisted in the commission of an armed robbery, during which a confederate assaulted or tried to kill one of the robbery victims.'" (*Ibid.*) But in no published decision, the court continued, had the crime of witness intimidation been found to be the natural and probable consequence of vehicle burglary or illegal possession of a weapon. "There is not 'a close connection' between any of the target crimes [the defendant] aided and abetted, and [the perpetrator's] commission of witness intimidation." (*Id.* at p. 161.) Even though the crimes were gang-related and were committed in a rival gang's territory, which increased the possibility that violence would occur, the court concluded "witness intimidation cannot be deemed a natural and probable consequence of any of the target offenses." (*Ibid.*)

Analogizing the facts in the case at bar to those in *Leon*, Lopez and Navarrete contend Martinez's shooting of the church volunteers was not only unforeseeable in the abstract, but also unforeseeable as a practical matter because it was unnecessary and entirely unexpected. Lopez and Navarrete's argument ignores the significant fact that Leon was not convicted of a crime of violence—assault or attempted murder—based on the second gang member's discharge of a firearm during the vehicle burglaries; he was convicted of witness intimidation. (*People v. Leon*, *supra*, 161 Cal.App.4th at p. 157; see § 136.1.) That nontarget offense did not simply require proof of a foreseeable violent response to a confrontation over gang activity, but rather

the anticipation that, if a bystander threatened to report the crime, the second gang member would attempt to prevent him from doing so—a more complex series of events.

Here, as discussed, Lopez, Navarrete and Martinez went into rival gang territory to spray graffiti, including markings mocking the rival gang. Officer Hernandez, the gang expert, testified infiltrating another gang's territory is an aggressive sign of disrespect and the graffiti crew would expect rival gang members to react to the intrusion with violence. For that reason, a gang member putting up graffiti in rival territory would likely go with a group that included, as here, a getaway driver and a shooter in case there was a confrontation. Based on this testimony and the evidence of Martinez's and Navarrete's actions after Acosta confronted Lopez and Ordonez and Baquiax appeared on the scene, the jury could reasonably find that Lopez and Navarrete foresaw the possibility that someone would attempt to stop Lopez from putting up graffiti and were prepared to react to such interference with force. That the threat to Lopez actually came from church volunteers, not rival gang members, does not make the shooting any less foreseeable. Lopez, Navarrete and Martinez were prepared for opposition to the vandalism; when it materialized, they reacted in a reasonably foreseeable manner.

3. *The Instruction on the Kill Zone Theory of Attempted Murder Was Harmless Error*

a. *The court's duty to instruct only on theories supported by substantial evidence*

The trial court has the duty to instruct the jury "'on the general principles of law relevant to the issues raised by the evidence.'" (*People v. Smith* (2013) 57 Cal.4th 232, 239.) The

court "'has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues."'" (*People v. Alexander* (2010) 49 Cal.4th 846, 920.)

When a jury has been instructed on a factual theory unsupported by substantial evidence, the error is one of state law "subject to the reasonable probability standard of harmless error under *People v. Watson* (1956) 46 Cal.2d 818, 836-836 . . . ." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) That is, reversal is not required "unless a review of the entire record affirmatively demonstrates a reasonable probability that the jury in fact found the defendant guilty solely on the unsupported theory." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1130; accord, *People v. McCloud* (2012) 211 Cal.App.4th 788, 803-804.)

b. *The kill zone theory of attempted murder*

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Superior Court* (*Decker*) (2007) 41 Cal.4th 1, 7.) As the Supreme Court explained in *People v. Bland* (2002) 28 Cal.4th 313, 328, "Someone who in truth does not intend to kill a person is not guilty of that person's attempted murder even if the crime would have been murder—due to transferred intent—if the person were killed. To be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else." Under limited circumstances, however, a defendant who targets a specific person by firing indiscriminately at a crowd may be convicted of attempted murder if the evidence shows he or she intended to kill everyone in the targeted victim's vicinity in order to strike the original

intended victim. (*Id*. at p. 330 ["[w]here the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone"].)

Here, the trial court instructed the jury pursuant to CALCRIM No. 600: "The defendants are charged in Count Two with Attempted Murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing another person; [¶] AND [¶] 2. The defendant intended to kill that person. [¶] . . . [¶] A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of Santos Baquiax, the People must prove that the defendant not only intended to kill Andres Ordonez, but also either intended to kill Santos Baquiax or everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Santos Baquiax by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Santos Baquiax." Lopez and Navarrete contend it was error to give this instruction because it included the kill zone theory, which was not supported by substantial evidence.[5]

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[5] Although Lopez and Navarrete did not object to the kill zone instruction, we review any claim of instructional error that allegedly affects the defendants' substantial rights even in the absence of an objection. (§ 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976-977, fn. 7.) We can only determine if the defendants' substantial rights were affected by deciding whether

The court, however, also instructed the jury pursuant to CALCRIM No. 200 that "[s]ome of these instructions may not apply, depending on your findings about the facts of the case. Do not assume just because I give a particular instruction that I am suggesting anything about the facts. After you have decided what the facts are, follow the instructions that do apply to the facts as you find them."

c. *The court's erroneous instruction did not prejudice Lopez or Navarrete*

The evidence at trial established that, as Baquiax and Ordonez first appeared and approached Lopez and Acosta, Lopez ran to the waiting BMW and Martinez got out of the car and fired three or four shots in their direction. At that point Baquiax was about six feet from Acosta, and Ordonez about 12 feet away from him. Nothing about this factual scenario supports an inference that Martinez targeted Ordonez and shot at everyone in his immediate vicinity to ensure Ordonez was killed. Rather, the evidence supports the conclusion Martinez aimed at both Ordonez and Baquiax, intending to kill each of them for attempting to assist Acosta or apprehend Lopez. This is essentially what the prosecutor argued to the jury—that Martinez intended to kill both men, but "Mr. Baquiax was lucky enough to live."

Lopez and Navarrete assert the kill zone instruction was unsupported by the evidence and necessarily prejudicial because it was the only theory of attempted murder presented to the jury. Although they are correct the attempted murder instruction

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the instruction was given in error and, if so, whether the error was prejudicial.

improperly included the kill zone theory, it did more than that: The jury was instructed the nontarget offense of attempted murder had been committed if the People proved "the defendant not only intended to kill Andres Ordonez, but also either intended to kill Santos Baquiax or everyone within the kill zone." As discussed, the evidence supported a finding of intent to kill both Ordonez and Baquiax. The prosecutor did not argue or rely on the kill zone theory, and the jury was directed to ignore instructions that did not apply to the facts as it found them. Under these circumstances it is not reasonably probable the jury convicted Lopez and Navarrete of the attempted murder of Baquiax based "solely on the unsupported theory." (*People v. Guiton*, *supra*, 4 Cal.4th at p. 1130; accord, *People v. McCloud*, *supra*, 211 Cal.App.4th at pp. 803-804.)

4. *Substantial Evidence Supports the Criminal Street Gang Findings*

Lopez and Navarrete challenge the jury's findings they committed the crimes for the benefit of a criminal street gang, arguing the People failed to prove the gang members who had committed the predicate offenses were members of the same gang subset as Lopez and Navarrete, as required by *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), and the evidence on which the gang expert relied was not competent under *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). Neither challenge to the sufficiency of the evidence for the gang findings has merit.

a. *Prunty*

To obtain a true finding on an allegation of a criminal street gang enhancement, the People must prove the crime at issue was "committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent

to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1).) A "criminal street gang" is defined as an organization that has as one of its primary activities the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and whose members have engaged in a "pattern of criminal gang activity" by committing two or more of such "predicate offenses" on separate occasions or by two or more persons within a three-year period. (§ 186.22, subds. (e), (f); *People v. Loeun* (1997) 17 Cal.4th 1, 9.)

In *Prunty* the defendant argued the People failed to introduce sufficient evidence to prove that he had committed the underlying offenses for the benefit of a criminal street gang, challenging the prosecution's theory the relevant ongoing organization, association or group was the gang known as the Norteños in general. (*Prunty*, *supra*, 62 Cal.4th at p. 70.) Specifically, the defendant contended "the prosecution's use of crimes committed by various Norteño subsets to prove the existence of a single Norteño organization . . . improperly conflated multiple separate street gangs into a single Norteño gang without evidence of 'collaborative activities or collective organizational structure' to warrant treating those subsets as a single entity." (*Ibid*.)

The Supreme Court agreed, holding, "[W]here the prosecution's case positing the existence of a single 'criminal street gang' for purposes of section 186.22(f) turns on the existence and conduct of one or more gang subsets, then the prosecution must show some associational or organizational connection uniting those subsets. That connection may take the form of evidence of collaboration or organization, or the sharing of material information among the subsets of a larger group.

Alternatively, it may be shown that the subsets are part of the same loosely hierarchical organization, even if the subsets themselves do not communicate or work together. And in other cases, the prosecution may show that various subset members exhibit behavior showing their self-identification with a larger group, thereby allowing those subsets to be treated as a single organization." (*Prunty*, *supra*, 62 Cal.4th at p. 71; see *id*. at p. 81 ["the prosecution must show that the group the defendant acted to benefit, the group that committed the predicate offenses, and the group whose primary activities are introduced, is one and the same"].)

At Lopez and Navarrete's first trial, at which the jury convicted them of vandalism and found true the criminal street gang allegation as to that charge, Officer Hernandez testified the cliques within the Rockwood Street gang were First and Westmoreland, K.T.O., Hartford, Sixth and Union, Down Ones, and Pequenos. Those cliques were "gang members from the same gang but they're just in different areas from where necessity branch out from, where they started." The various cliques used common gang symbols and hand signs.

Officer Hernandez also testified the gang's primary activities were murder, attempted murder, robbery and extortion. Richard Alvarez, a Rockwood Street member known as Shaggy or Shadow, was convicted of a murder committed in 2007. Rodrigo Bernal, a Rockwood Street member known as Scooby or Woody, was convicted of a murder committed in 2008.

At the second trial the trial court asked Officer Hernandez specifically whether there was "some kind of associational connection" between the Westmoreland and K.T.O. sets, noting that "[s]ome gangs with actual subsets could actually be rivals,

correct?" Officer Hernandez agreed that was the case "[f]or some," but "[i]n Rockwood they're—none of the cliques are against each other at all." The court then asked, "So what I want to know is what's the associational relationship between these two different cliques as well as others of Rockwood?" Officer Hernandez responded, "As far as like the Westmorelands since that block is—nobody really hangs out there. Those that are from Westmoreland come over here to hang out with the cliques on our side of the . . . Rampart Division." In response to further questioning, he explained that Westmoreland and K.T.O. had their own hierarchies, but they were part of the common organization, not completely separate.

The court also asked Officer Hernandez, "How does that organizational composition interact?" The officer answered, "Well, they all hang out together. The people that we have suspected of being in charge of running that clique don't always come out and talk to us but we are told and from information we've gathered that they do hang out and they do conduct their business all as one."

Lopez and Navarrete contend this evidence was not sufficient for the jury to find the required associational or organizational connections among Rockwood Street, Westmoreland and K.T.O. Additionally, they argue the People's evidence of primary activities and predicate crimes did not prove the specified murders had been committed as part of criminal gang activity because there was no evidence as to the subsets, if any, to which the perpetrators (Bernal and Alvarez) belonged and, thus, no way to link the Westmoreland and K.T.O. subsets to the Rockwood gang.

A comparison of the gang evidence in this case and that in *Prunty* exposes the flaws in Lopez and Navarrete's argument. In *Prunty* the defendant was an admitted member of the Detroit Boulevard Norteño set. (*Prunty*, *supra*, 62 Cal.4th at p. 68.) The gang expert "testified that the Norteños are 'a Hispanic street gang active in Sacramento and throughout California' with about 1,500 local members." (*Id.* at p. 69.) The "Sacramento-area Norteños are not associated with any particular 'turf' but are instead 'all over Sacramento' with 'a lot of subsets based on different neighborhoods.'" (*Ibid.*) The expert also described the primary activities of Sacramento-area Norteños and the common names, signs, symbols and color of the Norteños. (*Ibid.*) The expert identified the Norteños' enemy as the Sureños street gang, which had its own letters, number and color. (*Ibid.*) He explained that "[b]oth the Norteños and the Sureños 'originated out of the California prison systems' in the 1960's and 1970's. The Sureños are associated with the Mexican Mafia prison gang, while the Norteños have a 'street gang association' with the Nuestra Familia, or NF, prison gang." (*Ibid.*)

The gang expert "described a 2007 confrontation between two Norteño gang subsets, the Varrio Gardenland Norteños and the Del Paso Heights Norteños, that led to two Varrio Gardenland members' convictions for a variety of offenses, including murder and attempted murder. [He also] testified about a 2010 incident in which members of the Varrio Centro Norteños shot at a former Norteño gang member. Besides [the expert's] testimony that these gang subsets referred to themselves as Norteños, the prosecution did not introduce specific evidence showing these subsets identified with a larger Norteño group. Nor did [the expert] testify that the Norteño

subsets that committed the predicate offenses shared a connection with each other, or with any other Norteño-identified subset." (*Prunty*, *supra*, 62 Cal.4th at p. 69.)

The Supreme Court found that "where the prosecution's evidence fell short is with respect to the predicate offenses. [The expert] referred to two offenses involving three alleged Norteño subsets . . . . Although [the expert] characterized these groups as Norteños, he otherwise provided no evidence that could connect these groups to one another, or to an overarching Sacramento-area Norteño criminal street gang. . . ." (*Prunty*, *supra*, 62 Cal.4th at p. 82.) In addition, the expert's testimony did not "demonstrate that the subsets that committed the predicate offenses, or any of their members, self-identified as members of the larger Norteño association that the defendant sought to benefit. Although there was ample evidence that [the defendant] self-identified as both a member of the Detroit Boulevard Norteños and the larger umbrella Norteño gang, and that he collaborated with a member of another subset to commit his present offenses, the prosecution presented no evidence that the members of the Varrio Gardenland and Varrio Centro Norteños self-identified as part of the umbrella Norteño gang." (*Id*. at pp. 82-83.)

Here, in contrast, Officer Hernandez's testimony established Rockwood Street had a relatively small number of members and a discrete territory. The cliques were not separate entities, but acted as parts of a common organization whose members spent significant amounts of time with one another. Thus, the jury had evidence from which it could reasonably find that acts by members of any particular subset of Rockwood Street were intended to benefit the larger gang itself. (See *Prunty*,

supra, 62 Cal.4th at p. 83 [the prosecution needed to present evidence from which the jury could "connect the subsets that committed the predicate offenses to the larger Norteño group the prosecution claimed [the defendant] acted to benefit"].) The acts of Alvarez and Bernal, no matter what subset of Rockwood Street they may have belonged to, were predicate acts of members of the same criminal street gang Lopez and Navarrete sought to benefit.

b. *Sanchez*

As a further challenge to the sufficiency of the evidence to support the predicate acts element of the criminal street gang findings, Lopez and Navarrete argue Officer Hernandez's opinion regarding the association between the subsets and the Rockwood gang conveyed to the jury case-specific hearsay evidence prohibited by the Supreme Court's recent decision in *Sanchez*, *supra*, 63 Cal.4th 665, which held a gang expert may not "relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Id*. at p. 686.)[6]

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[6] Trial in this case took place before the Supreme Court issued its decision in *Sanchez*, which disapproved the Court's earlier decision, *People v. Gardeley* (1996) 14 Cal.4th 605, "to the extent it suggested an expert may properly testify regarding case-specific out-of-court statements without satisfying hearsay rules." (*Sanchez*, *supra*, 63 Cal.4th at p. 686, fn. 13.) Lopez and Navarrete's claim of error based on *Sanchez* has not been forfeited by their failure to object on this ground in the trial court. "Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert 'basis' evidence does not violate the confrontation clause." (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted Mar. 22, 2017, S239442 [review granted on question

The prosecution's gang expert in *Sanchez* had worked as a gang officer for 17 years and had investigated more than 500 gang cases. (*Sanchez*, *supra*, 63 Cal.4th at p. 671.) While he had never met Sanchez and had never been present during any police contacts with him, the expert had reviewed Sanchez's "STEP notice" provided to suspected gang members warning of criminal exposure for participating in gang crimes as well as his "field identification" (FI) card chronicling his gang history. (*Id*. at pp. 672-673.) The gang expert also described four reports of contacts police had with Sanchez and related statements contained in police documents. (*Ibid*.) He testified about the Delhi gang culture, its activities and territory and offenses committed by other Delhi gang members. (*Id.* at p. 672.) Based on all this information, the expert opined that Sanchez was a member of the Delhi gang and had possessed the gun and drugs at issue in the case to benefit the gang. (*Id.* at p. 673.)

The Supreme Court reversed the gang enhancement because the expert testimony that Sanchez was in a gang was based upon erroneously admitted evidence. (*Sanchez*, *supra*, 63 Cal.4th at p. 671.) The Court "adopt[ed] the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth. If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is

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regarding imposition of sentence of life without parole on juvenile offender]; accord, *People v. Welch* (1993) 5 Cal.4th 228, 237-238 [no forfeiture "where an objection would have been futile or wholly unsupported by substantive law then in existence"].)

a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing." (*Id*. at p. 686.) The Court identified testimonial hearsay statements to be those made "primarily to memorialize facts relating to past criminal activity, which could be used like trial testimony. Nontestimonial statements are those whose primary purpose is to deal with an ongoing emergency or some other purpose unrelated to preserving facts for later use at trial." (*Id.* at p. 689.)

The *Sanchez* Court, however, carefully limited the reach of its holding. First, it explained, "Our decision does not call into question the propriety of an expert's testimony concerning background information regarding his knowledge and expertise and premises generally accepted in this field. . . . Thus, our decision does not affect the traditional latitude granted to experts to describe background information and knowledge in the area of his expertise." (*Sanchez*, *supra*, 63 Cal.4th at p. 685.) The Court found the gang expert's testimony about general gang behavior and his descriptions of the conduct and territory of Sanchez's gang were admissible because "based on well-recognized sources in [the expert's] area of expertise." (*Id*. at p. 698.)

Second, the *Sanchez* Court emphasized, "Any expert may still *rely* on hearsay in forming an opinion and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. . . . There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific

hearsay that does not otherwise fall under a statutory exception. [¶] What an expert *cannot* do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-686.)

Under the facts in *Sanchez* the Supreme Court concluded the gang expert's testimony relating case-specific information obtained from police reports was improper testimonial hearsay because it concerned "case-specific facts . . . gathered during an official investigation of a completed crime." (*Sanchez*, *supra*, 63 Cal.4th at p. 694.) The expert testified about the portion of STEP notices retained by the police, which were signed by an officer under penalty of perjury and included the "defendant's biographical information, whom he was with, and what statements he made . . . ." (*Id.* at p. 696.) The Court concluded this information was sufficiently formal to constitute testimonial hearsay. (*Id.* at pp. 696-697.)

Here, Lopez and Navarrete tacitly concede the propriety of Officer Hernandez's testimony that Lopez was a Rockwood Street member and Navarrete an associate, the evidence at issue in *Sanchez*, but argue his opinion the Westmoreland and K.T.O. subsets were associated with, and part of, the Rockwood gang presented inadmissible case-specific hearsay without independent supporting proof. They also contend Officer Hernandez's testimony Alvarez and Bernal were Rockwood gang members was inadmissible under *Sanchez*.

Lopez and Navarrete misperceive the nature of Officer Hernandez's opinion testimony concerning the subsets of the Rockwood gang. As discussed, expert testimony that relies on hearsay is still admissible provided the expert only tells the jury

in general terms the bases for his or her opinion and does not relate as true case-specific facts asserted in hearsay statements. (*Sanchez*, *supra*, 63 Cal.4th at pp. 685-868.) That is exactly what Hernandez did here, opining about the relationship of the Westmoreland and K.T.O. subsets to the Rockwood gang without repeating any specific statements from third parties regarding the operation and organization of the Rockwood gang. (Cf. *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1175; *People v. Vega-Robles* (2017) 9 Cal.App.5th 382, 411.)

Moreover, in crafting an argument based not only on state hearsay law but also under the federal confrontation clause as articulated in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], Lopez and Navarrete make no attempt to demonstrate Officer Hernandez's testimony regarding the various subsets of Rockwood Street was based on testimonial hearsay, rather than personal knowledge. (See *Sanchez*, *supra*, 63 Cal.4th at p. 685 [confrontation clause implicated when the expert bases his or her opinion on case-specific testimonial hearsay].) An expert's testimony based on personal knowledge of case-specific facts is admissible. (*Id*. at p. 683.) The record reflects Officer Hernandez's testimony regarding Alvarez and Bernal was based on personal knowledge—he had testified at both men's trials for what was identified here as the gang's predicate offenses—and the certified minute orders from those cases. This evidence was sufficient to support a finding as to the predicate offenses. (*People v. Duran* (2002) 97 Cal.App.4th 1448, 1463; *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1228.)

5. *The Trial Court Did Not Err by Failing To Instruct on Voluntary Manslaughter and Attempted Voluntary Manslaughter*

The trial court has a duty to "instruct on all lesser included offenses supported by substantial evidence. [Citations.] The duty applies whenever there is evidence in the record from which a reasonable jury could conclude the defendant is guilty of the lesser, but not the greater, offense. [Citations.] That voluntary manslaughter is a lesser included offense of murder is undisputed. [Citations.] [¶] Imperfect self-defense, which reduces murder to voluntary manslaughter, arises when a defendant acts in the actual but unreasonable belief that he is in imminent danger of death or great bodily injury." (*People v. Duff* (2014) 58 Cal.4th 527, 561-562.) These principles extend to "one who kills in imperfect defense of others—in the actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury." (*People v. Randle* (2005) 35 Cal.4th 987, 997, overruled on another ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; see *People v. Nguyen* (2015) 61 Cal.4th 1015, 1066 [imperfect self defense or defense of others requires "'an unreasonable belief that harm was imminent'"].)[7]

Lopez and Navarrete contend the facts demonstrated that Martinez was attempting to protect Lopez from an attack by the three men who came from the church parking lot and his use of deadly force, while unreasonable, supported an instruction on voluntary manslaughter (as to Ordonez) and attempted voluntary

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[7] "Imperfect defense of others, like imperfect self-defense, is not a true defense, but a shorthand description for a form of voluntary manslaughter." (*People v. Trujeque* (2015) 61 Cal.4th 227, 271.)

manslaughter (as to Baquiax). But they cite nothing in the record to support this contention, instead only making a generalized argument the evidence established "Martinez was acting to protect [Lopez] from attack by others who outnumbered her." What the evidence actually showed, however, was that, after Acosta confronted Lopez spray painting graffiti on the church wall, she attacked him, knocking him to the ground and kicking him. When Baquiax and Ordonez came out but were still six to 12 feet away, Lopez ran to the BMW. At the same time, Martinez got out of the BMW and shot at Baquiax and Ordonez. At that point Lopez was in no danger; she certainly was not under attack and outnumbered by three men.

6. *Lopez Is Entitled to a Limited Remand for the Purpose of Making a Record for Use at a Future Youthful Offender Parole Hearing*

Section 3051, as enacted in 2013, provided "[a] person who was convicted of a controlling offense that was committed before the person had attained 18 years of age and for which the sentence is a life term of 25 years to life shall be eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." (Former § 3051, subd. (b)(3), Stats. 2013, ch. 312, § 4.) In 2015 the Legislature amended the section to apply to a person who committed his or her crime before attaining the age of 23, effective January 1, 2016. (Stats. 2015, ch. 471, § 1.)

Lopez was 22 years old when she committed the crimes at issue in this case. She was sentenced on April 8, 2016 and, accordingly, will be entitled to a youth offender parole hearing under section 3051. She contends we should remand her case to

the trial court to provide her an opportunity to present evidence of her youth-related characteristics that will be evaluated at her future youth offender parole hearing, as contemplated by the Supreme Court's decision in *Franklin*, *supra*, 63 Cal.4th 261.

In *Franklin*, decided six weeks after Lopez was sentenced, the Supreme Court explained section 3051 "contemplate[s] that information regarding the juvenile offender's characteristics and circumstances at the time of the offense will be available at a youth offender parole hearing to facilitate the Board's consideration. For example, section 3051, subdivision (f)(2), provides that '[f]amily members, friends, school personnel, faith leaders, and representatives from community-based organizations with knowledge about the individual before the crime . . . may submit statements for review by the board.' Assembling such statements 'about the individual before the crime' is typically a task more easily done at or near the time of the juvenile's offense rather than decades later when memories have faded, records may have been lost or destroyed, or family or community members may have relocated or passed away. In addition, section 3051, subdivision (f)(1) provides that any 'psychological evaluations and risk assessment instruments' used by the Board in assessing growth and maturity 'shall take into consideration . . . any subsequent growth and increased maturity of the individual.' Consideration of 'subsequent growth and increased maturity' implies the availability of information about the offender when he [or she] was a juvenile." (*Id*. at pp. 283-284.)

The defendant in *Franklin* was sentenced to 50 years to life prior to the enactment of section 3051. (*Franklin*, *supra*, 63 Cal.4th at p. 268.) It was unclear whether the defendant had

a sufficient opportunity to put on the record at the sentencing hearing the kinds of information the statute deems relevant at a youth offender parole hearing. (*Id*. at p. 284.) As a result, the Supreme Court held the matter should be remanded to the trial court for a "determination of whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Ibid*.) If the trial court determined Franklin had not had a sufficient opportunity to make a record, the Supreme Court directed he could "place on the record any documents, evaluations, or testimony (subject to cross-examination) that may be relevant at his eventual youth offender parole hearing, and the prosecution likewise may put on the record any evidence that demonstrates the juvenile offender's culpability or cognitive maturity, or otherwise bears on the influence of youth-related factors." (*Ibid*.)

Lopez acknowledges section 3051 was already in effect at the time of her sentencing hearing and her counsel "perfunctorily addressed" the relevant factors. Counsel told the sentencing court Lopez "was twenty-one years old at the time of the incident. She's somebody who never went to formal school past sixth grade. She never had a father. When she was thirteen her mother was deported and she never saw her again. She is someone who has really had a difficult life. And I think that contributes to why she ended up down the path that she did." Given the newly recognized significance of youth-related information to subsequent parole evaluations, Lopez argues, as in *Franklin*, she should be given the opportunity to make a more complete record for use at a future youth offender parole hearing.

We encountered a similar situation earlier this year in *People v. Jones* (2017) 7 Cal.App.5th 787. We explained that,

prior to the Supreme Court's decision in *Franklin*, "there [had been] no clear indication that a juvenile's sentencing hearing would be the primary mechanism for creating the record of information required for a youth offender parole hearing 25 years in the future. *Franklin* made clear that the sentencing hearing has newfound import in providing the juvenile with an opportunity to place on the record the kinds of information that 'will be relevant to the [parole board] as it fulfills its statutory obligations . . . .'" (*Jones*, at p. 819.) In light of the Supreme Court's direction as to the role of the sentencing hearing for youthful offenders who come within the scope of section 3051, we held we could not assume defense counsel at a pre-*Franklin* hearing anticipated the extent to which evidence of youth-related factors was a critical component of the sentencing hearing. As a result, we concluded, in many cases, depending on the record developed at the sentencing hearing, it will be appropriate to remand the matter so the trial court can follow the procedures outlined in *Franklin* to ensure that such opportunity is afforded to the defendant. (*Jones*, at pp. 819-820.)

The same result is necessary in this case—that is, a remand so the trial court can ensure Lopez has been provided a full opportunity to develop a record that may be used at a future youthful offender parole hearing.

7. *Sentencing Errors*

Navarrete contends, the People concede, and we agree the trial court erred in imposing five-year enhancements for a prior serious felony (§ 667, subd. (a)(1)) and in imposing both the firearm-use and criminal street gang enhancements (although the gang enhancements were stayed). This second error affected the sentence of both Lopez and Navarrete.

The information alleged Navarrete had a prior robbery conviction constituting a strike within the meaning of sections 667, subdivisions (b) through (i), and 1170.12. It did not allege the robbery was also a serious felony under section 667, subdivision (a)(1). Navarrete admitted the strike prior, and the trial court sentenced Navarrete as a second-strike offender. But the court also imposed five-year enhancements on both indeterminate life terms for a prior serious felony conviction under section 667, subdivision (a)(1).

A prior serious felony enhancement under section 667, subdivision (a)(1), is subject to pleading and proof requirements. (*People v. Jackson* (1985) 37 Cal.3d 826, 835, fn. 12.) Because that enhancement was not pleaded and proved by the People here, the trial court erred in imposing the five-year terms.

As to the murder and attempted murder counts, the trial court imposed on both Navarrete and Lopez 25-year-to-life firearm-use enhancements under section 12022.53, subdivisions (d) and (e)(1).[8] It also improperly imposed and stayed on those two counts 10-year gang enhancements pursuant to section 186.22, subdivision (b)(1)(C).

Subdivision (e)(1) of section 12022.53 permits the trial court to impose a firearm-use enhancement on a principal who did not personally use a firearm "'if both of the following are pled and proved: [¶] (A) The person violated subdivision (b) of Section 186.22. [¶] (B) Any principal in the offense committed

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[8] The abstracts of judgment as to both Navarrete and Lopez erroneously reflect the firearm-use enhancements were imposed pursuant to section 12022.53, subdivision (b). On remand the abstracts must be corrected to state the enhancements were imposed pursuant to subdivisions (d) and (e)(1).

any act specified in subdivision (b), (c), or (d).'" (*People v. Brookfield* (2009) 47 Cal.4th 583, 590.) Subdivision (e)(2) of section 12022.53 "limits the effect of subdivision (e)(1). A defendant who *personally* uses or discharges a firearm in the commission of a gang-related offense is subject to *both* the increased punishment provided for in section 186.22 *and* the increased punishment provided for in section 12022.53. In contrast, when another principal in the offense uses or discharges a firearm but the defendant does not, there is no imposition of an 'enhancement for participation in a criminal street gang . . . in addition to an enhancement imposed pursuant to" section 12022.53. (§ 12022.53(e)(2).)" (*Brookfield*, at p. 590.) Accordingly, the trial court erred in imposing enhancements pursuant to section 186.22, subdivision (b)(1)(C). (See *Brookfield*, at p. 596.) For the same reason, the trial court erred in imposing both the firearm-use enhancement and a 15-year minimum parole eligibility period under section 186.22, subdivision (b)(5)[9] as to count 2. (*Brookfield*, at p. 595 ["the word 'enhancement' in section 12022.53(e)(2) refers to both the sentence enhancements in section 186.22 *and* the penalty provisions in that statute"]; accord, *People v. Gonzalez* (2010) 180 Cal.App.4th 1420, 1427 ["the trial court erred in imposing the gang statute's minimum parole eligibility period in addition to the 25-year gun enhancement"]; see *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1238.)

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[9] Section 186.22, subdivision (b)(5), provides: "Except as provided in paragraph (4), any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served."

As modified to eliminate the impermissibly imposed enhancements, Lopez's sentence is 40 years to life on count 1 (second degree murder), consisting of an indeterminate term of 15 years to life plus 25 years to life for the firearm-use enhancement, and a concurrent term on count 2 (attempted premeditated murder) of life plus 25 years to life for the firearm-use enhancement, and a two-year term for vandalism stayed pursuant to section 654. As modified, Navarette's sentence is 55 years to life on count 1, consisting of an indeterminate term of 30 years to life for second degree murder (15 years to life doubled for the prior strike conviction) plus 25 years to life for the firearm-use enhancement, and a concurrent term of 14 years to life for attempted premeditated murder, and a two-year term for vandalism stayed pursuant to section 654.

DISPOSITION

As modified to correct the sentencing errors described, the judgments are affirmed. Lopez's case is remanded for further proceedings pursuant to *People v. Franklin*, *supra*, 63 Cal.4th 261. The superior court is directed to prepare corrected abstracts of judgment and to forward them to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

SEGAL, J. MENETREZ, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.